

REMARKS

The Applicants respectfully maintain that they have amended the specification and claims to overcome all of the objections and rejections asserted by the Examiner in the Office Action mailed March 13, 2003. Reconsideration and Reexamination is respectfully requested.

CLAIM OBJECTIONS

The Applicant has amended claims 1, 10-13, and 18 to overcome inadvertent objections by changing the claim dependency to properly recited the claimed invention. Withdrawal of the objections is respectfully requested.

DRAWING OBJECTIONS

In the Office Action at paragraph 3, the Examiner objected to Figures 1, 4 and 7-8 for including various reference signals that were not mentioned in the Specification. In response, the Applicants have submitted proposed drawing amendments along with this response to remove these reference items from the Figures. As such, withdrawal of the objection is respectfully requested.

35 U.S.C. 103 REJECTIONS

In the Office Action at paragraph 5, the Examiner asserts an rejection under 35 U.S.C. 103(a), rejecting claims 1-27, asserting that they are unpatentable over Goodwin et al. (US 6,158,049) in view of Levine, et al. (US 6,349,406). Goodwin teaches a software performance profiling system. This type of system is similar to the prior art profiling systems expressly described within the background section of the application at pages 1-3. Goodwin teaches the process of instrumenting portions of software that is of interest where testing is to occur. The teachings expressly make a distinction between “instrumented” code and “uninstrumented” code. In addition, Goodwin teaches the use of separate “optimized code” after the instrumented code has

been executed to collect profile data used to generate optimized code. See Col. 7, lines 26-44 as one example.

In contrast, the claimed invention utilizes performance markers that are permanently inserted into application programs that are used in testing, benchmarking, and profiling the operation of the software. These performance markers are intended to be in the final version of the software that is ultimately delivered to end users. The Goodwin distinction between uninstrumented and instrumented code is consisted with all prior art systems where the instrumentation code is added for the purposes of testing and made to impose little or no impact upon the performance measures created by the instrumentation code. However, the application program is in fact modified to insert the instrumentation code in place of uninstrumented code. In contrast, the claimed invention, as amended, requires the permanent insertion of performance markers into the application programs that impose little if any overhead to operate, and thus are not removed from the application program when the application has completed its testing.

The Examiner cites Levine for a teaching of subtracting an estimate of an overhead associated with the use of instrumentation code to determine the performance measurements for the actual application program. Levine does not remedy this deficiency in Goodwin. In fact, Levine teaches away from the permanent insertion of performance markers into an application program. As noted in Col. 8, Levine teaches the use of a JAVA interpreter that is itself instrumented such that performance measures may be obtained. From this, Levine expressly notes that application program itself does not include such markers. Therefore, Levine may not be combined with any teaching for a system in which the use of permanent performance markers are included within an

application program. These claims are now patentable over the prior art of record for at least these reasons.

As such, Goodwin alone or in combination with Levine or any other prior art of record does not render as unpatentable the claimed invention, as amended, that is recited within independent claims 1, 13, and 18. For at least the above reasons, independent claims 1, 13 and 18 are patentable over Goodwin.

Dependent claims 2-12, 14-17 and 19-27 recite additional limitations that further distinguish the claimed invention from the teaching found in Goodwin and are also allowable for at least the same reasons recited above.

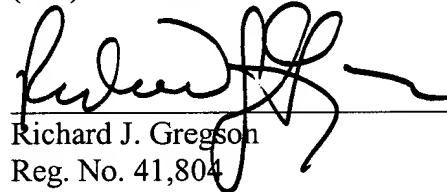
CONCLUSION

For all of the above reasons, the Applicants respectfully maintain that the pending claims, as amended, are now patentable over the prior art of record. For these reasons, the Applicants respectfully request that the above objections and rejections be withdrawn and the application be passed for allowance.

Respectfully submitted,
MERCHANT & GOULD P.C.
P.O. Box 2903
Minneapolis, Minnesota 55402-0903
(612) 332-5300

Date: _____

22 Aug 2003



Richard J. Gregson
Reg. No. 41,804

